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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 54

MICHAEL J. REGAN

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 730

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to review a judgment of a state court of last resort, the New York Court of Appeals, rendered March 12, 1954, affirming the conviction of petitioner for the crime of criminal contempt of court.

The indictment and subsequent judgment are posited upon a New York statute which declares that the contumacious and unlawful refusal of a witness to answer any legal and proper interrogatory constitutes the crime of criminal contempt (New York Penal Law, Section 600).

Questions Presented

1. Where by statute in New York a witness is accorded complete immunity against criminal prosecution in exchange for his testimony before a Grand Jury, does compulsion to testify nevertheless constitute a denial of due process within the intendment of the Fourteenth Amendment to the Constitution of the United States?

2. Was the execution by petitioner of the formal waiver of the benefits of the immunity statute attended by such circumstances as to constitute a denial of due process under said amendment?

Record Facts

Petitioner was duly indicted by Grand Jury of the County of Kings in the State of New York.

The Indictment

Prefatory averments recite the inauguration of the December 1949 Grand Jury and its various extensions to complete the unfinished business pending before it (20, 21).* The particular subject of inquiry on the occasion of petitioner's appearance before it as a witness was:

> "whether any plainclothes police officers of the City of New York, of whatever rank, who were charged with the specific duty of enforcing the laws against gambling and vice, had received bribes from book-

* Numerals refer to folios in the Record.

> makers and gamblers within the County of Kings; whether any of said police officers were protecting said bookmakers and gamblers within the County of Kings and for money or other consideration paid to said police were affording them immunity from detection, arrest and prosecution for violation of the laws against gambling and whether any of said police officers had financial assets or income which he could not account for, from legitimate sources" (22, 23).

It is then charged that prior to March, 1951, petitioner was a plainclothes police officer in the City of New York and had been assigned to duty as such to the office of the Police Commissioner (24).

On March 7, 1951, petitioner appeared as a witness before said Grand Jury and was duly sworn (24). His examination was adjourned to December 22, 1952, when the following legal and proper interrogatory was put to him (26):

> "Q. While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers."

It is then averred that petitioner "wilfully and unlawfully refused to answer said interrogatory and to testify" (26).

On January 5, 1953, a Judge of the County Court (Leibowitz, *J.*) upon application of the Grand Jury therefor duly made, directed petitioner to testify. However, recalled before the Grand Jury, he persisted in his refusal (27).

The indictment concludes with averments that the interrogatories propounded were "legal and proper" and charges petitioner with the crime of Criminal Contempt of Court (27-30).

The Evidence

It was developed through the People's witness, Mr. Koch, a civilian employee in the Office of the Clerk of the Police Department of New York City, that petitioner was appointed to the police force in 1942 (225). He resigned in October, 1947 but was readmitted in October, 1948 (228). During a substantial period of his tenure in the Police Department, he was assigned to duty as a plainclothesman, attached variously to Division Offices and to the Police Commissioner's plainclothes squad (225-228). On March 27, 1951, petitioner was "dropped from the rolls" of the Police Department (229).

Plainclothes squads are specifically enjoined to enforce laws against gambling (232). The jurisdiction of the Police Commissioner's plainclothes squad is city wide (233).

Petitioner's maximum gross annual salary as a plainclothesman was $4,150 (237).

It was stipulated that "the Grand Jury was duly organized, that it was duly in session at all times from December, 1949 to date, and that all of its actions were pursuant to law, functioning as a Grand Jury, and that there is no question being raised here or any technicality being raised here about the power of the Grand Jury to function as a Grand Jury pursuant to the order of the Court as filed with the Clerk of the Court" (244, 245).

Mr. Chadeayne, Foreman of the Grand Jury, testified that on March 7, 1951, petitioner appeared as a witness before that body and an oath was duly administered to him (249, 250).

Prior thereto, petitioner had executed and delivered a formal waiver of immunity (250). This waiver subsequently marked in evidence as People's Exhibit 2 (433) reads as follows (434-438):

"County Court, Kings County

The People of the State of New York

—against—

John Doe,

Defendant.

Waiver of Immunity

I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, Borough of Brooklyn—

• • • • •

of the City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry for legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(Signed) Michael J. Regan.

Witness:
Gerald V. Clarke

State of New York,
County of Kings, SS.:

On this 7th day of March, 1951, before me personally appeared Michael J. Regan, to me personally known and known to me to be the individual described in and who executed the above waiver, and duly acknowledged that he executed the same.

Richard Eric Alleyne,

* * * * *

Notary Public, Kings County."

On the appearance of March 7, 1951, a financial questionnaire was delivered to petitioner, a form of which was received in evidence as People's Exhibit 3 (261). He was instructed to answer the questions thereon contained and return the document completed on March 28, 1951 (329).

We have noted that on March 27, 1951, the day before his scheduled return to the Grand Jury, petitioner's association with the Police Department was severed (229).

The subsequent appearance of petitioner before the Grand Jury occurred on October 22, 1952 when he was given another form of questionnaire (261-263). He was instructed in the Grand Jury to complete and return it,

answered on November 12, 1952, to which he acquiesced (357).

On November 12, 1952, he reappeared before the Grand Jury (263). His questionnaire had not been completed and his examination was adjourned to afford him additional time pursuant to his request for that purpose (359, 360).

We now approach the immediate circumstances which culminated in this indictment.

On December 22, 1952, petitioner again appeared before the Grand Jury (267). He reaffirmed his prior execution of the waiver of immunity (364). He was then asked:

> "While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers".

to which he stated his desire to read his statement to the Grand Jury. The statement thus read, follows (365-367):

> "Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.
>
> I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

> I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such".

It will be marked that despite his prior appearances before the Grand Jury, this was the first time that petitioner declined to testify or alleged a privilege against self-incrimination or disavowed the waiver of immunity which had been executed by him some eighteen months earlier (406-408).

It was stipulated upon the trial as follows:

Upon petitioner's refusal to testify, on December 22, 1952, an application was immediately made in open Court before Judge Leibowitz to overrule his objection and direct him to testify. A hearing was thereupon held at which petitioner appeared in person and by Mr. Hellenbrand, an attorney who represented him on the trial of this indictment (380). The hearing was not completed on December 22, 1952 and was adjourned to January 5, 1953, when it was continued. Upon the completion thereof, Judge Leibowitz overruled petitioner's objections, held that the waiver of immunity was effective and binding upon him

and directed him to return to the Grand Jury and testify (380-382).

The stenographic minutes of the proceedings in open court before Judge Leibowitz on December 22, 1952 and January 5, 1953, were marked for identification as People's Exhibits 5 and 4 respectively (301, 298). These exhibits were proffered in evidence, but the offer was not pressed in view of the subsequent stipulation of petitioner hereinabove described (376-382).

Mr. Chadeayne testified and it was conceded by appellant that on the occasion of the latter's appearance before it, the Grand Jury was investigating "whether any of these policemen had swollen bank accounts and swollen assets which could be traced to the graft that was allegedly being passed by the bookmakers to the police, so that the bookmakers would have protection and carry on their business without interruption by the police". Petitioner agreed that the Grand Jury had a "right to investigate that" (273). The questions put to him were relevant and not "in the wild air" (291).

On January 5, 1953, after Judge Leibowitz had directed petitioner to testify, he reappeared before the Grand Jury immediately (390). The following questions were then put to him to which he replied (391-397):

> "Q. Mr. Regan, this morning you appeared before County Judge Leibowitz, did you not? A. I did.
>
> Q. There was a hearing conducted before County Judge Leibowitz concerning a statement made by you on your appearance on December 22, 1952 with respect to your testifying? A. That's right.
>
> Q. Did Judge Leibowitz direct you to return to

this Grand Jury and answer all legal and appropriate interrogatories? A. He did.

Q. Did he tell you, in words or substance, that he overruled your claim that your waiver of immunity was not effective and that when you testified you would have to testify under a valid, effective and legal waiver of immunity? A. He did.

Q. Now, you have been recalled to this Grand Jury, have you not? A. Yes, sir.

Q. This proceeding before Judge Leibowitz was about a half hour ago, was it not? A. That's correct.

Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers? A. I'd like to read a statement at this time.

Q. Well, first, will you answer the question or do you refuse to answer? A. I refuse to answer the question.

Q. Now, read it slowly and loudly. A. (Reading):

Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.

I claim my constitutional and statutory privileges and immunities.

It is claimed that I signed a waiver of immunity before this body sometime in March of 1951 and that this waiver remains effective and I must testify without any immunity that I would otherwise have. I claim that this waiver is not effective because I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not afforded an opportunity to employ counsel and that I was not advised by anyone that I did not have to sign a waiver nor at the time of the execution of

this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I claim my Constitutional rights were not properly safeguarded or explained to me and that there is a doubt and uncertainty concerning my status as a witness and my privileges and duties as such.

Q. Does that conclude your statement? A. It does.

Q. Mr. Regan, you were a police officer for nine years before you retired or resigned? A. Yes, sir.

Q. Were you in plainclothes during that period? A. Part of the time; yes, sir.

Q. How long were you a plainclothesman? A. In all, I'd say approximately two years."

The chronology of petitioner's appearances before the Grand Jury and the Court and the folio references where the minutes thereof are printed *in extenso* are as follows:

March 7, 1951, Exhibit 6, Record, page 109

October 22, 1952, Exhibit 7, Record, page 119

November 12, 1952, Exhibit 8, Record, page 120

December 22, 1952, Exhibit 9, Record, page 121

January 5, 1953, Exhibit 10, Record, page 130.

The Defense

Petitioner did not testify in his own behalf. He called as his sole witness Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.

The waiver of immunity was read by petitioner before he signed it (492). Mr. Clarke, stated that he was familiar

with the procedure and practice of summoning witnesses before the Grand Jury (449). He was the individual who had requested petitioner to execute the waiver (449). The waiver was signed in an anteroom adjacent to the Grand Jury, in which were contained a desk and bench (470, 471). The room was crowded at one time and there might have been thirty-five or twenty-five men present when the waiver was signed (477). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (480, 490). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (482). He advised petitioner "as to what this Grand Jury was concerned with" at or before he signed the waiver (485), and that "if he is going to be put in the Grand Jury he must sign the waiver" (488).

Twenty-five minutes were consumed by the thirty-five men in executing their respective waivers, all in the immediate presence of Mr. Clarke, including petitioner (491, 492). *The latter called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it* (501, 502).

On March 7, 1951, the treatment of petitioner in the anteroom was the same as was accorded to the other patrolmen who were executing waivers (432).

Of utmost significance is an event which transpired immediately after petitioner executed the waiver. He was ushered into the Grand Jury room where he was questioned as follows (People's Exhibit 6, 327 *et seq.*):

"*By Mr. Clarke*:

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

"Waiver of immunity referred to received in evidence and marked People's Exhibit 317, of this date.

"(Witness was thereupon sworn.)"

ARGUMENT

POINT I

New York Statute Law accorded petitioner adequate immunity against prosecution in return for his testimony before the Grand Jury. By his execution of the waiver of immunity, petitioner voluntarily relinquished the benefits which these immunity statutes accorded him. There was no denial of due process.

We shall assume, *arguendo*, that the due process clause in the Fourteenth Amendment is applicable to the state procedures evidenced in this record. The query then is suggested, upon the facts at bar was due process denied to petitioner? We think not. Petitioner's refusal to testify

before the Grand Jury was without warrant in law. Any testimony which might have been elicited from him could not have been self-incriminatory because he had been granted complete statutory immunity from criminal prosecution. When petitioner appeared before the Grand Jury, that body was investigating into the possible commission of the crimes of Conspiracy (New York Penal Law, Section 580, *et seq.*), Gambling (New York Penal Law, Section 970, *et seq.*) and Bribery and Corruption (New York Penal Law, Section 370). At that time,* these statutes (Gambling, Section 996, Conspiracy, Section 584, Bribery, Section 381) provided that no person should be excused from testifying, but in the event he does

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial."

These immunity statutes are coextensive with the constitutional guarantee against self-incrimination and therefore supplant the privilege incorporated in the Constitution of the United States as well as that of New York (Article 1, Section 6).

> *Counselman* v. *Hitchcock*, 142 U. S. 547;
> *Brown v. Walker*, 161 U. S. 591;
> *Glickstein* v. *U. S.*, 222 U. S. 139, 141;
> *Matter of Doyle*, 257 N. Y. 244;

* These statutes have since been amended to define the method by which immunity could be obtained (Laws of New York, 1953, Chapter 891, effective September 1, 1953).

Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983.

What effect did the execution of the formal waiver of immunity have upon the rights of petitioner? The Gambling, Conspiracy and Bribery statutes of New York in destroying petitioner's privilege against self-incrimination expressly substituted equivalent benefits therefor, *i.e.*, that the testimony which might be elicited from him would not be used against him in any proceeding and that he would not be prosecuted criminally for any matter which his testimony might disclose. The formal document executed by petitioner entitled "Waiver of Immunity" by its terms simply waived the benefits which these immunity statutes conferred upon him. However, this waiver of the benefits did not operate retrospectively to restore the privilege against self-incrimination which the Gambling, Conspiracy and Bribery statutes had previously destroyed by the grant of immunity.

We perceive no merit, therefore, in petitioner's contention (brief, page 17) that New York had denied him immunity for incriminating answers.

POINT II

The execution of the waiver of immunity did not deprive petitioner of due process.

In his Point II, petitioner urges that he was denied due process in his execution of the waiver of immunity. We think this contention is specious. Petitioner, a policeman,

was a public officer and employee of the City of New York. The New York State Constitution, Article 1, Section 6, provides *inter alia*:

> "providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Section 903 of the Charter of the City of New York provides in part:

> "If any * * * officer or employee of the City shall * * * wilfully refuse or fail to appear before any court * * * or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the City * * * or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant and he shall not be eligible to election or appointment to any office or employment under the City or any agency."

Certainly these provisions do not constitute *legal* duress of the petitioner. There is no evidence in the record before this Court and no *express* assertion by petitioner that his

act in executing the waiver was induced by the supervening duress of the statute. But even if petitioner signed the waiver through fear of losing his office as a police officer, it would not constitute duress cognizable in law. His act was voluntary. Legal duress connotes wrongful or venal conduct by a contracting party exerted against another. (Restatement of Law of Contracts, Section 493, cited with approval in *Williston, on Contracts*, Revised Ed., Vol. V, page 4497). In *Deshong* v. *City of New York*, 176 N. Y., 475, 479, the Court said:

> "Payment coerced by duress or unlawful compulsion may be recovered back. The coercion however, must be illegal, unjust or oppressive."

Williston, *supra*, at page 4500 says:

> "One element of the early law of duress continues to exist, however its boundaries may be otherwise extended. The pressure must be wrongful and not all pressure is wrongful."

At bar, petitioner was confronted with the alternative of forfeiting his office or executing the waiver. No wrongful pressure was exercised by the statute or the constitution. He could have refused to execute the document and have instituted legal proceedings to contest the forfeiture of his office. In such event no legal duress could be posited.

> *Board of Trustees* v. *O. D. Wilson Co.*, 133 Fed. 2nd, 399.

Petitioner's further contention as to the effectiveness *in futuro* of the waiver of immunity (brief, pages 15, 16) is untenable.

The charge of the trial court, to which no exception was taken, that the waiver of immunity continued effective throughout the entire investigation by the Grand Jury established the law of this case and precludes petitioner's present contention. At folios 600 through 602, the Court instructed the jury as follows:

> "If an effective waiver was signed by him, if he knew full well what he was doing when he went into the Grand Jury room in March of 1951, that waiver was good for all time thereafter. Is that simple English, Mr. Foreman and gentlemen? He did not have to be asked to sign a waiver each time he appeared before the Grand Jury, just as long as the life of that Grand Jury continued and they were 'attending to their knitting,' as set forth in the order of the Court, that waiver was effective. That should settle the point in your mind that may arise in your discussion in the jury room. Once the waiver is signed, provided it is an effective waiver, that waiver continues during the life of that Grand Jury. If the waiver was effective in March of 1951; if he knew what he was doing when he signed that waiver and also if he knew the import of it, as it is claimed by the prosecution in this case, if you are so satisfied beyond a reasonable doubt, he had no right to refuse to testify in December of 1952."

There was no exception to this charge and we think that the law of the case was thereby established.

N. Y. Code of Criminal Procedure, Sec. 420-a.

At page 16 of his brief, petitioner urges that he was denied the right to counsel when he executed the waiver of immunity and before the Grand Jury. It is true that

he was not represented by counsel, but the record at bar does not disclose that he was *denied* the right thereto. There is no evidence that he had ever invoked that right, if indeed such right existed at all (cf. *In Re Black*, 47 Fed. 2nd 542).

Petitioner argues that he had no understanding of his rights at the time he executed the waiver of immunity. This statement is purely gratuitous and finds no support in the record at bar. He did not testify at the trial. The question whether he signed the waiver knowingly and fully aware of its import and significance was submitted to the trial jury as a question of fact which was resolved against him.

CONCLUSION

The arguments which petitioner advances to invoke jurisdiction are not embraced within the "character of reasons" suggested in Rule 38 of the Revised Rules of this Court, and we urge therefore that

The petition should be denied.

Dated, Brooklyn, New York
May 10, 1954.

Respectfully submitted,

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